

FCC MAIL SECTION

Federal Communications Commission

FCC 96D-08

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Before the

DISPATCHED BY
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	MM DOCKET NO. 96-91
)	
COLLEGE OF SOUTHERN IDAHO)	
)	
Licensee of Station KEZJ(AM))	
Twin Falls, Idaho)	
)	
Order to Show Cause Why the License for)	
Station KEZJ(AM), Twin Falls, Idaho,)	
Should Not be Revoked)	

Appearances

Ken Campbell, Dean of Information Technology, and *Dr. Jerry Beck*, Vice President of Instruction, on behalf of the College of Southern Idaho; and *Robert A. Zauner, Esquire*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

**SUMMARY DECISION
OF ADMINISTRATIVE LAW JUDGE ARTHUR I. STEINBERG**

Issued: October 10, 1996

Released: October 15, 1996

Preliminary Statement

1. By *Order to Show Cause and Hearing Designation Order*, DA 96-583, released April 16, 1996 ("OSC"), the Assistant Chief, Audio Services Division, Mass Media Bureau, by delegated authority, directed the College of Southern Idaho (the "College") to show cause why the license for Station KEZJ(AM), Twin Falls, Idaho (the "Station"), should not be revoked. The following issues were specified (OSC at para. 3):

- (a) To determine whether the College of Southern Idaho has the capability and intent to expeditiously resume broadcast operations of KEZJ(AM) consistent with the Commission's Rules.

- (b) To determine whether the College of Southern Idaho has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.
- (c) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the College of Southern Idaho is qualified to be and remain the licensee of Station KEZJ(AM).

2. The *OSC* placed upon the Mass Media Bureau ("Bureau") both the burden of proceeding with the introduction of evidence and the burden of proof with respect to all the issues. (*OSC* at para. 4.) An informal conference call among representatives of the College, Bureau counsel, and the Presiding Judge took place on May 31, 1996. A prehearing conference was held on July 30, 1996. (Tr. 4-24.)

3. Presently under consideration are a Motion for Summary Decision, filed on September 9, 1996, by the College; Supplements thereto, filed on September 19 and October 2, 1996, by the College; and Comments in support of the Motion, filed on October 8, 1996, by the Bureau.

Findings of Fact

4. The *OSC* recited the following facts as the basis for the specification of the issues in this proceeding (*OSC* at para. 2, footnotes omitted):

The Commission's records indicate that KEZJ(AM) has been off the air since December 16, 1993, and that the special temporary authority permitting the [S]tation to remain silent expired February 2, 1996. Thus, KEZJ(AM) has been off-air for over two years and presently is not authorized to remain silent. Consequently, [the] College is in apparent violation of Sections 73.1740(a) and 73.1750 of the Commission's Rules.

5. In its Motion for Summary Decision, the College does not dispute the facts quoted above. Rather, the College relies on the following additional facts to support its Motion.¹

¹ The factual matter contained in the College's Motion is supported by the declaration under penalty of perjury of Ken Campbell, Dean of Information Technology at the College (referred to as "Motion at —"), and the specific exhibits cited in the text.

6. On December 16, 1993, the Station was donated to the College by B & B Broadcasting, Inc. ("B & B"). (College Ex. A.1, pp. 2-3.) The gift of the Station to the College was an unexpected event. (Motion at 4.) On January 12, 1994,² the College sent a letter to the Commission stating that the Station was transferred to the College, that the Station was silent on the date of the consummation of the gift, and that the Station would remain silent until approval was gained for an Educational Communications Program at the College. (College Ex. A.1, p. 1.)

7. The College accepted the gift of the Station in preparation for the development of a Mass Communications Program. (College Ex. C.1.) At that point in time, the College began the process of establishing the requisite organizational and academic structures to utilize the Station in the performance of its educational mission. (Motion at 4.) The College also started the process of requesting approval for a Mass Communications Program from the Idaho State Board of Education. (College Ex. C.1.)

8. Dean Campbell stated that, during the period from December 16, 1993, to the present, the College has attempted to stay in compliance with the Commission's Rules and to keep the Commission apprized of its efforts to resume broadcasting. (Motion at 2.) In support of this statement, the College cites the following, *inter alia*.

(a) On March 28, 1994, the College received temporary authority for the Station to remain silent. (Motion at 2.)

(b) On April 18, 1994, the College sent a letter requesting authorization to remain silent for an additional three months. On June 23, 1994, the College received temporary authority for the Station to remain silent for the period requested. (Motion at 2.)

(c) On November 1, 1994, the College received a request from the Commission to submit a request to remain silent. On November 23, 1994, the College received temporary authority to remain silent. (Motion at 2.)

(d) On March 17, 1995, the College received a request from the Commission to submit an FCC Form 302 to resume operations, to submit an updated justification for continuing to remain off the air, and to submit a request

² The relevant letter in College Ex. A.1 is dated January 12, 1993. This appears to be an obvious typographical error.

for an extension of its prior temporary authorization to remain silent. On March 30, 1995, the College received temporary authority for the Station to remain silent. (Motion at 2-3.)

(e) On July 19, 1995, the College received another request from the Commission to submit an FCC Form 302 to resume operations, to submit an updated justification for continuing to remain off the air, and to submit a request for an extension of its prior temporary authorization to remain silent. On July 24, 1995, the College sent to the Commission a request for authorization to remain silent. On August 2, 1995, the College received temporary authority for the Station to remain silent. (Motion at 3.)

9. The Station's most recent authority to remain silent expired on February 2, 1996, and the College failed to submit a request for a further extension of that authority. According to Dean Campbell, this failure was not deliberate or intended to circumvent the Commission's Rules. (Motion at 3.)

10. Dean Campbell testified that the College is fully committed to the creation of a Mass Communications Program that will utilize the broadcast environment of the Station as a training site for young professionals. (Motion at 3 and 4.) To this end, the College has performed the requisite studies, has made application to the Idaho State Board of Education for the implementation of a Mass Communications Program, and is awaiting final approval of its application.³ (College Ex. C.2.) The Station will be a major asset in a Mass Communications Program curriculum. (*Id.* at pp. 2-5; Motion at 3.)

11. The College was established in 1965 and currently operates with an annual budget of nearly \$17 million. (Motion at 3; College Exs. D.1 and D.3.) The College's funding is derived from state appropriations (approximately 50 percent), local-district property taxes (approximately 25 percent), and student tuition (approximately 25 percent). (Motion at 3; College Ex. D.1.) The College serves nearly 7,000 credit students yearly. (Motion at 3.) The College is in sound financial condition as evidenced by its most recent audit. (College Ex. D.2.)

³ By letter to the Presiding Judge dated October 4, 1996, Dean Campbell reported that the Idaho State Board of Education, at its September 19-20, 1996, meeting, approved the College's proposal for the development of a Mass Communications Program. (Official notice taken.)

12. The College has established an Information Technology Department which will oversee the operational requirements of the Station. (Motion at 3.) According to J. Mike Mason, the College's Dean of Finance, the College is fully committed to provide the necessary funding to operate and maintain the Station. (College Ex. D.3.)

13. Since the College received the *OSC* in April 1996, it has attempted to expedite the process of resuming the broadcast operations of the Station independent of its efforts to establish a Mass Communications Program. (Motion at 3.) Specifically, the College has:

(a) Established a contractual relationship with B & B for the lease of a transmitter site, daily tower light inspections, and meter readings (College Ex. E.1);

(b) Established an equalized telephone line link between the College's studio operations and the transmitter site (College Ex. E.2);

(c) Established a contractual relationship with Boise State Radio for the provision of telecommunication technical engineering support, including broadcast radio operations (College Ex. E.3);

(d) Established 24-hour per day retransmission rights for multicultural programming to be broadcast on the Station prior to the initiation of a Mass Communications Program and, thereafter, when original programming is not available (College Ex. E.4);

(e) Purchased and installed VRC remote control equipment for the remote operation of the Station (College Ex. E.5); and

(f) Established faculty space for broadcast studio operations (Motion at 4).

14. On September 5, 1996, the Station resumed broadcast operations. Dean Campbell stated that the resumption of operations took somewhat longer than anticipated due to problems in the installation of the remote control equipment, the calibration of the transmitter power meters, and sporadic problems in the transmitter. (Motion at 4.)

Conclusions of Law

15. The Motion for Summary Decision will be granted and the issues will be resolved in the College's favor. Pursuant to Section 1.251 of the Commission's Rules, in order to warrant summary decision a party must show that there is no genuine issue of material fact remaining for determination at the hearing. In order to sustain such a motion, it must be established that the truth is clear, that the basic facts are undisputed, and that the parties are not in disagreement regarding the material factual inferences that may be properly drawn from such facts. *Big Country Radio, Inc.*, 50 FCC 2d 967 (Rev. Bd. 1975). The College has met this stringent test.

16. With respect to Issue 1, the findings establish, and it is concluded, that the College does have the capability and intent expeditiously to resume the broadcast operations of the Station. Suffice it to say, in light of the fact that the Station resumed broadcast operations on September 5, 1996, the capability and intent of the College are beyond question. In this connection, the College has obtained a lease for a transmitter site, made arrangements for technical engineering support and the remote operation of the Station, made arrangements for programming the Station on a 24-hour per day basis, established operational control of the Station in the College's Information Technology Department, established faculty space for the broadcast studio, and pursued the establishment of a Mass Communications Program that will utilize the Station as a training site for young professionals. Further, the College is in sound financial condition and has made a commitment to provide the necessary funding to operate and maintain the Station. Under these circumstances, Issue 1 is resolved in favor of the College. *Keyboard Broadcasting Communication*, 10 FCC Rcd 4489 (MMB 1995).

17. Turning to Issue 2, it must be concluded that, although the College did not violate Section 73.1750 of the Commission's Rules, it was in violation of Section 73.1740(a)(4) of the Rules for approximately seven months. Such violation, however, does not reflect adversely upon the basic qualifications of the College to remain a Commission licensee.

18. Section 73.1750 of the Commission's Rules provides:

The licensee of each station shall notify the FCC in Washington, DC of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall

forward the station license and other instruments of authorization to the FCC, Washington, DC for cancellation.

The College did not violate this section of the Rules. The findings establish that the College clearly had the intention ultimately to restore the Station to operation. This is evidenced by the fact that, during the period of silence, the College developed a Mass Communications Program, which was submitted for approval to the Idaho State Board of Education, and established an Information Technology Department. Further, concrete steps were taken by the College to put the Station back on the air, resulting in the resumption of broadcast operations on September 5, 1996. Moreover, there is no evidence that the College ever intended to discontinue permanently the operation of the Station.

19. Section 73.1740(a)(4) of the Commission's Rules provides, in pertinent part:

In the event that causes beyond the control of a licensee make it impossible . . . to continue operating, the station may . . . discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of . . . discontinued operation. . . . In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

The findings establish that the College was in violation of this provision of the Rules from February 2, 1996, when its special temporary authority to remain silent expired, to September 5, 1996, when the Station resumed broadcast operations. During that seven-month period, no written request for an extension of the authority to remain silent was made.

20. According to Dean Campbell, the failure to request an extension was not deliberate or intended to circumvent the Commission's Rules. This testimony is credible in light of the fact that, between March 1994 and August 1995, the Commission authorized the Station to remain silent on *five* separate occasions. In view of this history, there would have been no logical reason for the College intentionally to have refrained from asking for a further extension, and there does not appear to be any motive for the College to have attempted to mislead or deceive the

Commission. Thus, Dean Campbell's testimony that the violation was not deliberate will be fully credited. It is concluded, therefore, that this rule violation does not impact adversely upon the College's basic qualifications. Cf. *Video Marketing Network, Inc.*, 10 FCC Rcd 7611, 7613 (MMB 1995); *Cavan Communications*, 10 FCC Rcd 2873 (ALJ 1995). Consequently, Issue 2 will be resolved in the College's favor.

Ultimate Conclusion

21. In sum, it has been concluded that the College has the capability and intent expeditiously to resume the broadcast operations of the Station consistent with the Commission's Rules, that the College did not violate Section 73.1750 of the Commission's Rules, and that the College did violate Section 73.1740(a)(4) of the Rules. It has been further concluded that the College's rule violation was not deliberate and is not disqualifying. It is, therefore, ultimately concluded that the College is qualified to be and to remain a Commission licensee. *Video Marketing Network, Inc.*, *supra*; *Keyboard Broadcasting Communication*, *supra*; *Cavan Communications*, *supra*.

Accordingly, IT IS ORDERED that the Motion for Summary Decision filed by the College of Southern Idaho on September 6, 1996, IS GRANTED, and Issues 1, 2 and 3 ARE RESOLVED in favor of the College of Southern Idaho.

IT IS FURTHER ORDERED that this proceeding IS TERMINATED.⁴

FEDERAL COMMUNICATIONS COMMISSION

Arthur I. Steinberg
Administrative Law Judge

⁴ In the event exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release pursuant to Sections 1.251(e) and 1.276(d) of the Rules.